

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



75-1006

To be argued by  
PHYLLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----x  
UNITED STATES OF AMERICA,

Appellee,

-against-

WILLIE L. ROLAND,

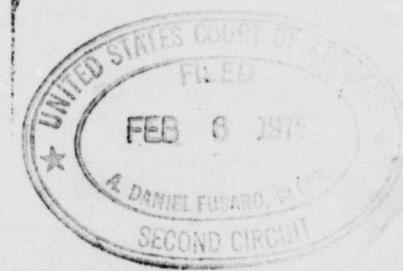
Appellant.

-----x  
Docket No. 75-1006

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APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK



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THE LEGAL AID SOCIETY,  
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Of Counsel

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JUDGE MAC MAHON 74 CRIM. 996

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	<i>For U. S.:</i>
vs.	Thomas M. Fortuin, AUS
<input checked="" type="checkbox"/> WILLIE L. ROLAND	791-0932

ABSTRACT OF COSTS (07)	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,	.				
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					
21:812, 841(a)(1),(b) Distr. & possess.					
w/intent to distr. Heroin, I. (Cts 1&2)					
(Two Counts)					

DATE	PROCEEDINGS
10-24-74	Filed indictment.
11-4-74	Deft. appears Atty. present pleads not guilty. 10 days for motions. Deft. released on his own recognizance. Cannella, J. Case assigned to MacMahon, J. for all purposes.
11-18-74	Pre-Trial Conference held. Trial date set for 11-20-74.
11-20-74	Trial Begun (Atty for Daft., Roland Theu + U.S. Atty Fredrick Davis )
11-21-74	Trial continued and concluded. Jury returns verdict at 8:35 PM. Jury finds Daft. NOT GUILTY on Count One - GUILTY on Count Two. Pre-Sentence report ordered. -- MacMAHON, J. Sentence on 12-17-74 @ 12:45.



USA-33s-521 - IND/INF - DISTRIB. POSSES NARC. DRUG  
TMF:emw Rev. 5-27-72  
74-2668

JUDGE MAC MAHON

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

74 CRIM. 996

UNITED STATES OF AMERICA

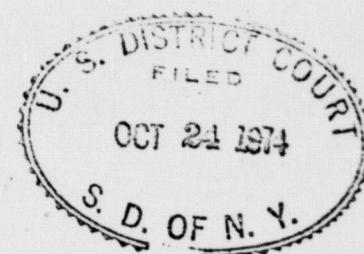
-v-

INDICTMENT

WILLIE L. ROLAND,

: 74 Cr.

Defendant



:  
----- x  
FIRST COUNT

The Grand Jury charges:

On or about the 26th day of March, 1974  
in the Southern District of New York

WILLIE L. ROLAND

the defendant, unlawfully intentionally and knowingly did  
distribute and possess with intent to distribute a  
Schedule I narcotic drug controlled substance, to wit,  
approximately 24.5 grams of heroin.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

USA-33s- 522 - IND/INF - Distrib. Possess Narc. Drug (Succeeding Count)  
Rev. 5-2-72

TMF:emw  
74-2668

SECOND COUNT

The Grand Jury further charges:

On or about the 14th day of June, 1974  
in the Southern District of New York,

WILLIE L. ROLAND

the defendant , unlawfully, wilfully and knowingly did  
distribute and possess with intent to distribute a  
Schedule I narcotic drug controlled substance, to wit,  
approximately 28.8 grams of heroin.

(Title 21, United States Code, Sections 812,  
841(a)(1) and 841(b)(1)(A).)

Mr. Sher  
\_\_\_\_\_  
FOREMAN

Paul J. Curran  
\_\_\_\_\_  
PAUL J. CURRAN  
United States Attorney



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
THE UNITED STATES OF AMERICA

vs.

WILLIE L. ROLAND,

Defendant.

**INDICTMENT**  
74 Cr.

(21 USC §§ 812, 841(a)(1)  
and 841(b)(1)(A).)

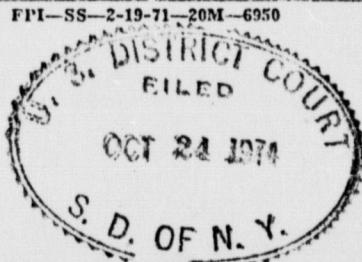
PAUL J. CURRAN

United States Attorney.

A TRUE BILL

Paul Curran

F. C. Curran.



NOV 4 1974

Deft appears (atty Roland  
(Thru, legal and present) Deft  
pleads n/o Case assigned to  
Mac Nea. J. 10 days for motions  
Deft ROR MR

Curran, J.

11-18-74 Pre-Trial Conference Held. Trial date set for 11-20-74

11-20-74 Trial Begun (Atty for deft. Roland Thru.)  
(U.S. Atty Frederick Davis)

11-21-74 Trial Continued and Concluded.

Jury returns verdict at 8:35 P.M.  
d. Jury finds deft. Not guilty on Count one.

Guilty on Count Two

Pre-sentence report ordered. MacMahon / J.M.  
12-17-74 Sentence 12-45.

12-17-74 Deft sentenced to 3 years and 3 years  
special parole on Count 2. Deft to commence  
on 12-30-74 in Count term 5-06

MacMahon / J.M.

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2 UNITED STATES OF AMERICA  
3 vs.  
3 WILLIE L. ROLAND

New York, N. Y.  
November 21, 1974  
9:30 a.m.

(Trial resumed, jury present.)

CHARGE OF THE COURT

9 THE COURT: It now becomes my function to  
10 instruct you on the law that applies to the facts as you  
11 find them in this case. I am the exclusive judge of the  
12 law. And you must accept the law as I give it to you,  
13 whether or not you agree with it or whether or not you  
14 have some different notion about what the law is or ought  
15 to be. In short, I am the exclusive judge of the law.  
16 You, on the other hand, are the exclusive judge of the  
17 facts. You and you alone decide just what the facts are  
18 in this case. You decide what weight, what effect you  
19 will give to the evidence. You decide whether or not to  
20 believe a witness, and ultimately you decide whether the  
21 Government has sustained its burden of proving this  
22 defendant guilty beyond a reasonable doubt.

23 You are not to conclude from any rulings that  
24 I have made throughout this trial, or any questions that  
25 I have asked, that I have any opinion one way or the other

2 as to the guilt or innocence of this defendant. That  
3 decision is exclusively up to you.

4                   Finding the facts is merely a process by which  
5 you, the jury, consider the exhibits which have been  
6 received in evidence, consider the testimony of all of  
7 the witnesses, sift out what you believe, weigh it in the  
8 scale of your reasoning powers and draw such conclusions  
9 as your common sense and experience in life tell you  
10 that the evidence supports and justifies, and decide just  
11 where the truth lies in this case.

12                Now in this connection it is your memory of the  
13 evidence that controls. It is not the way I remember it,  
14 and not necessarily the way counsel remember it. If  
15 your memory squares with the lawyers' memory of the evidence  
16 as they wove the evidence together in their closing  
17 arguments you may accept their version of the evidence.  
18 But to the extent that you have a different recollection,  
19 you are bound to reject their version and rely on your  
20 own memory, and what I have said as to them also applies  
21 to me, although I do not intend in this very short trial  
22 to summarize the evidence. I am sure you have it all  
23 very fresh in mind. Your most important function is to  
24 determine which witnesses you are going to believe, and  
25 this is so as to every witness, whether called by the

2 Government or whether called by the defendant. You are  
3 not to give any greater credence to the Government  
4 witnesses simply because they are Police detectives, than  
5 you give to any other witness. You consider their testi-  
6 mony and measure its credibility by the same standards you  
7 apply to everyone else.

8 You are not to be influenced by the number  
9 of witnesses. You are concerned not with the quantity  
10 but with the quality of the evidence.

11 Now, the first test which you should apply in  
12 determining the trustworthiness of a witness is to measure  
13 what he says against your common sense. You are not bound  
14 to believe unreasonable statements, nor to accept statements  
15 that insult your intelligence, just because they are made  
16 under oath in a public courtroom.

17 You saw the witnesses in this case. In deciding  
18 whether to believe a witness you should consider his conduct  
19 and his manner on the stand. I saw you watching these  
20 witnesses with particular care as they were testifying.  
21 Obviously you were sizing them up. How did the witness im-  
22 press you? Was the witness being frank with you, or was he  
23 being evasive? Was his version of the evidence straightforwar-  
24 Was he trying to conceal anything? Was he just parrotting answers  
25 Did he have any motive to testify falsely? Is he interested  
in any way in the outcome of this case? How strong or

2 weak is his memory of important events? He he made any  
3 inconsistent statement on any earlier occasion, and if so  
4 what is its significance? In short, can you rely on the  
5 witness? Can you trust him? You ought to consider also  
6 his opportunity to know the facts about which he testified  
7 and the probability or improbability of what he said, and  
8 then how his testimony adds up when considered with the  
9 exhibits and with the other testimony. How does his story  
10 check out? Are there any inconsistencie, and if so how  
11 important are they?

12 Now the defendant testified as a witness. He  
13 was ~~at~~ required by law to do so, and his appearance as  
14 a witness in hiw own behalf was purely voluntary on his  
15 part. If he had chosen ~~not~~ to testify, his failure to do  
16 so could not have been considered by you in any manner in  
17 determining his guilt or innocence. But having testified,  
18 the law requires that his testimony be judged and appraised  
19 by the same standards which you apply to the testimony of  
20 all the other witnesses, giving consideration, of course,  
21 to his natural interest in the outcome of this case, to  
22 his background, his personality, and the impression he  
23 made upon you on the stand.

24 Now the defendant testified that he had been  
25 convicted of the crime of assault. You may consider that

2 fact in deciding whether to believe him. But you cannot  
3 consider the fact that he has earlier been convicted of  
4 another crime in deciding whether he is guilty of the crimes  
5 charged against him here.

6 Now if you find that any witness has deliberately  
7 and willfully lied with respect to any material fact in his  
8 testimony offered at this trial, you may adopt one of two  
9 course. If you wish, you can accept as much of his testimony  
10 as you believe or, if you wish, you can reject his entire  
11 testimony.

12 Before discussing the crimes charged here I  
13 want to remind you, as I did at the very outset of this  
14 trial, that an indictment is a mere accusation. It is not  
15 evidence of the truth of the charges made, and you are to  
16 draw no inference of guilt from the mere fact that a defendant  
17 has been indicted. An indictment simply means no more and no  
18 less, than that the defendant has been accused of a crime.

19 Now the defendant here has denied the charges  
20 made against him, both by his plea of not guilty and by his  
21 testimony upon the stand. The defendant has no burden of  
22 proof to sustain in this case. He is under no obligation to  
23 produce any witnesses. He is presumed to be innocent and this  
24 presumption of innocence continues throughout the trial, and  
25 during your deliberations. The presumption of innocence

2 is overcome when, and only when, the Government establishes  
3 the guilt of the defendant beyond a reasonable doubt.

4 Now what do I mean by beyond a reasonable doubt?  
5 As the phrase implies, a reasonable doubt is a doubt that  
6 is based upon reason, a reason which appears in the evidence  
7 or in the lack of evidence. It is not some vague, speculative,  
8 imaginary doubt, nor a doubt based upon what one of you  
9 might regard as an unpleasant duty.

10 The Government is not required to prove a  
11 defendant's guilt beyond every possible doubt, nor to an  
12 absolute or mathematical certainty, because such measure of  
13 proof is usually impossibly in human affairs.

14 You should review all of the evidence as you  
15 remember it, sift out what you believe, weigh it in the scale  
16 of your reasoning powers, and discuss it with your fellow  
17 jurors. If that process produces a solemn belief or con-  
18 viction in your mind, such as you would be willing to act  
19 upon without hesitation if this were an important matter of  
20 your own, then you may say that you have been convinced  
21 beyond a reasonable doubt.

22 On the other hand, if your mind is wavering, or  
23 so uncertain that you would hesitate to act if this were  
24 an important matter of your own, then you have not been  
25 convinced beyond a reasonable doubt and you must render  
a verdict of not guilty.

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2 two counts. Each of these counts charges a separate  
3 offense or crime, and each count must be considered  
4 separately, and because they are very brief I shall read  
5 them to you and we will send a copy of the indictment,  
6 in to you during your deliberations for your guidance.

7 The grand jury charges in the first count that  
8 on or about the 26th day of March, 1974, in the Southern  
9 District of New York, Willie L. Roland, the defendant,  
10 unlawfully, intentionally and knowingly did distribute and  
11 possess with intent to distribute a Schedule 1 narcotic  
12 drug controlled substance, to wit, approximately 24.5  
13 grams of heroin. And then the indictment cites certain  
14 statutes.

15 Count 2 charges exactly the same offense but on  
16 a different date, June 14, 1974, and the amount of heroin  
17 is alleged to be 28.8 grams.

18 Before you can find the defendant guilty on  
19 either of Counts 1 or 2, the Government must prove to your  
20 satisfaction beyond a reasonable doubt each of the  
21 following three elements: One, that on or about the date  
22 set forth in the count which you are considering the defendant  
23 distributed heroin or possessed heroin with an intent to  
24 distribute it. While Count 1 and 2 allege both  
25 distribution of heroin and possession of heroin with an

2 intention to distribute it, the Government is not required  
3 to prove both. The first element is satisfied if you find  
4 that the defendant either intentionally distributed  
5 heroin or knowingly possessed heroin with an intent to  
6 distribute it.

7 Now the word distribute means the actual,  
8 constructive or attempted transfer or passing on of the  
9 drugs. The word posession simply means either the actual  
10 physical possession of heroin, such as holding it in your  
11 hand, or having it on your person or such control of the  
12 drug that the defendant could move it himself or cause  
13 another person to move it at his direction or on his  
14 request. This is what is known as constructive possession.

15 Now the word intent refers to a person's state  
16 of mind. So then possess with intent to distribute means  
17 to control a narcotic drug with the state of mind or  
18 purpose to pass it to someone else or to transfer it or  
19 to sell it or to distribute it.

20 The second element is that the substance which  
21 was distributed or possessed with intent to distribute was  
22 in fact heroin.

23 Now the second element is satisfied if you  
24 believe the testimony of the chemist, which was submitted  
25 to you by stipulation, to the effect that if he were called  
to testify he would testify that he examined and analyzed

2 the contents of the exhibits received in evidence and  
3 found that they did in fact contain heroin.

4 Now the third element is that in distributing  
5 heroin or in possessing heroin with an intention to distri-  
6 bute it, the defendant acted knowingly and willfully.

7 Now an act is done knowingly if it is done volun-  
8 tarily and purposely and as a result of the exercise of one's  
9 free will, and not because of mistake, accident, negligence,  
10 ignorance, or other innocent reason. An act is done  
11 willfully if it is done knowingly, intentionally and  
12 purposefully.

13 Bear in mind knowingly does not mean that the  
14 defendant must know that he is breaking any particular  
15 law. It simply means that he must know what he is doing  
16 and that he must do it deliberately and on purpose, and  
17 intentionally.

18 Now in determining knowledge and intent it is  
19 obviously impossible to look into the defendant's mind,  
20 but you may infer knowledge and intent by examining all of  
21 the surrounding circumstances. In short, actions speak  
22 louder than words in trying to decide what is on a person's  
23 mind.

24 In determining whether the defendant acted knowingly  
25 intentionally, you should give consideration as to  
whether the transactions here were out in the open,

2 whether they were straightforward or circuitous, whether  
3 they were in cash, whether cash was dealt with, whether  
4 they were handled in a devious, secretive sort of way.

5 And any other acts or conduct on his part or anything  
6 that he may have said which in any way demonstrates to  
7 you that there was a consciousness of guilt on his part,  
8 in other words, that he knew that he was dealing here in  
9 dope.

10 You should consider each count separately. If  
11 you find as to the count which you are considering that  
12 the Government has failed to prove beyond a reasonable  
13 doubt all three elements of the crime as I have defined  
14 them, then you must acquit the defendant on that count.  
15 On the other hand, if you find, as to the count which  
16 you are considering, that the Government has proved beyond  
17 a reasonable doubt each of the elements of the crime as  
18 I have defined them, then you should convict him on that  
19 count.

20 Now the question of possible punishment of the  
21 defendant in the event of a conviction is no concern of  
22 yours, and it should not in any sense enter into or  
23 influence your deliberations. Your duty is to decide  
24 the case, to decide whether the Government has sustained  
25 its burden of proving this defendant's guilt beyond a

2 reasonable doubt. The duty of imposing punishment, if  
3 any, in the event of a conviction rests exclusively  
4 upon the Court.

5 Now, when you retire to the jury room  
6 treat one another with courtesy and respect, as I know  
7 you will. If differences of opinion arise your discussions  
8 should be dignified, calm and intelligent. Your verdict  
9 must be based on the evidence and the law, the evidence  
10 which was presented in this case, as you remember it, and  
11 the law as I have given it to you in this charge. You  
12 are each entitled to your own opinion. No juror should  
13 acquiesce in a verdict against his individual, conscientious  
14 judgment. Nevertheless, I would point out that no one  
15 should enter a jury room with such pride of opinion that  
16 he would refuse to change his mind no matter how  
17 convincing or how intelligent the argument of a fellow  
18 juror or jurors is. Discussion and deliberation are part  
19 of our democratic jury process, and you should approach  
20 your task in that spirit. Talk out your differences.  
21 Each of you should, in effect, decide the case for himself  
22 or herself after thoroughly reviewing the evidence  
23 and talking out your positions with your fellow  
24 jurors, with an open mind and with a desire to reach a  
25 verdict. If you do that you will be acting in the true  
democratic process of the American system of justice.

2                   There are twelve of you on this jury. The  
3 alternate will be excused with the thanks of the Court  
4 before you retire for your deliberations. Any verdict  
5 must be the unanimous verdict of all of you, and it must  
6 represent the honest conclusion of each of you.

7                   I submit the case to you with every confidence  
8 that you will fully measure up to the oath which you took  
9 as members of the jury to decide the issues submitted to  
10 you fairly and impartially, and without fear or favor.

11                  Now, members of the jury, if you find that  
12 you find that the Government has failed to establish the  
13 guilty of the defendant beyond a reasonable doubt, you  
14 should acquit him. If you find that the defendant has not  
15 violated the law you should not hesitate for any reason  
16 whatever to render a verdict of not guilty.

17                  But, on the other hand, if you find that the  
18 Government has established the guilt of the defendant beyond  
19 a reasonable doubt, you should not hesitate because of  
20 sympathy or any other reason to render a verdict of guilty.

21                  Your foreman will return an oral verdict in  
22 open court of either guilty or not guilty on each count.  
23 Consider each count separately and your verdict will be  
24 either guilty or not guilty on Count 1, guilty or not  
25 guilty on Count 2.

2                   Are there any exceptions, gentlemen?

3                   (At the side bar)

4                   MR. DAVIS: The Government has no exceptions.

5                   MR. THAU: Your Honor, the defendant excepts to  
6                   that part of your charge, the later portion of it, where  
7                   you said in substance if you find that the defendant has  
8                   not violated the law you should acquit him. That causes  
9                   the problem to make an affirmative finding of innocence,  
10                   and my suggestion is that they be told if you have but  
11                   a reasonable doubt whether the defendant violated the  
12                   law.

13                   THE COURT: I note your exception.

14                   MR. THAU: There is additionally in your Honor's  
15                   discussion of intent the way it was couched almost a  
16                   presupposition and an assumption, as I heard it, that the  
17                   defendant did transact the business testified to here  
18                   by Nieves. Your Honor went at great length into that the  
19                   defendant in the transaction had been furtive and whether  
20                   he intended to do what, as I read it, your Honor suggested  
21                   he had in fact done, which was transact the business. I  
22                   object to that.

23                   THE COURT: I note your exception.

24                   MR. THAU: Thank you.

25                   Your Honor also said that their most important

2 function is to decide which witnesses they were to believe.  
3 In a criminal case it is my judgment that they can well  
4 disbelieve the defendant entirely and yet still have a  
5 reasonable doubt based strictly on the Government's  
6 evidence. It is not a balancing of beliefs in a criminal  
7 case.

8 THE COURT: I note your exception.

9 MR. THAU: I would ask your Honor to add that  
10 reasonable doubt may arise from mere lack of evidence.

11 THE COURT: I think I did.

12 MR. THAU: Thank you, your Honor.

13 (In open court)

14 (A marshal was duly sworn.)

15 (At 10:11 a.m., the jury retired to  
16 commence their deliberations.)

17 THE COURT: Are there any exhibits other than  
18 the heroin in this case?

19 MR. DAVIS: The two heroin exhibits and also the  
20 two telephone numbers, your Honor, that were introduced.

21 THE COURT: We won't send them in unless the  
22 jury asks for them. We have your permission, Mr. Thau,  
23 to send them in if the jury asks, and could you agree on  
24 what those exhibits are and hand them to the Clerk now,  
25 so it won't be necessary to call you down if the jury

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2 sends in for th5 exhibits. We will just send in the two  
3 telephone numbers and not the dope.

4 Well, you asked them to see whether their  
5 fingerprints would fit on the glassine envelope.

6 MR. THAU: In that respect I would like to  
7 make a record of something just so that it is clear. I  
8 was really terribly embarrassed to find out during Mr.  
9 Davis' summation that I had inadvertently believed and  
10 argued on my summation that the particular envelope to  
11 which I referred was one which was originally in what was  
12 transferred to Nieves. As it turns out, and Mr. Davis  
13 brought me up on it on summation, unless they believe I  
14 made a dishonest argument, this envelope was supplied by  
15 the chemist apparently. I am terribly sorry. I apologize  
16 to the Court and as I did to Mr. Davis privately.

17 THE COURT: I have never known a case where  
18 that wasn't the situation. The chemist takes it out of  
19 the envelope, measures it and puts it back in another one.

20 MR. THAU: I have seen it done otherwise, your  
21 Honor.

22 THE COURT: I never can recall one in fifteen  
23 years on this bench.

24 (At 11:25 a.m., a note was received from  
25 the jury.)

2 THE COURT: I think the answer here probably  
3 should be, is that there is no transcript in existence  
4 of the testimony, and the written report is not in  
5 evidence.

6 MR. DAVIS: Fine.

7 MR. THAU: All right.

8 THE COURT: I will put "No, because there is  
9 no transcript of Mr. Roland's testimony yet available."  
10 I guess that is it. I suppose I should tell them.

11 MR. DAVIS: The note read "Mr. Roland's testimony  
12 to Mr. Figueroa," and I think --

13 MR. THAU: There was no testimony to Figueroa.

14 MR. DAVIS: Maybe they are referring to a  
15 statement of Figueroa. Is that possible?

16 MR. THAU: There is no evidence that Roland  
17 testified before Figueroa, for one thing. I think the  
18 Court ought to advise them of that.

19 THE COURT: Let's get the jury in and I will  
20 advise them. That is probably the best way to do it.

21 Bring in the jury.

22 (At 11:33 a.m. the jury returned to  
23 the courtroom.)

24 (Court Exhibit 1 marked.)

25 THE COURT: I have your note "Would it be

2 possible to see a transcript of Willie Roland's testimony  
3 to Mr. Figueroa and the written report of the policeman  
4 Ralph Nieves."

5 The answer is "No, there is no transcript of  
6 any testimony that Roland gave to Mr. Figueroa, none in  
7 evidence, and there is no report of Policeman Ralph  
8 Nieves in evidence."

9 You may resume your deliberations.

10 (At 11:34 the jury resumed their deliberations.)

11 MR. THAU: May we be heard by way of exception.  
12 Prior to your Honor's answering the note it had been my  
13 request that the Court make it plain to the jury that  
14 there was no evidence in this case that this defendant  
15 had testified before Nick Figueroa, and it had been my  
16 wish that the Court apprise the jury of that fact.

17 THE COURT: Call the jury back. I didn't so  
18 understand it. I think you are being exceedingly captious,  
19 Mr. Thau.

20 MR. THAU: I apologize to the Court. It is  
21 not my intention, I assure you.

22 - - -

23 MR. THAU: I would also ask the Court to not  
24 tell the jury that it is at the request of any particular  
25 side that your Honor is adding this.

2 (At 11:36 a.m. the jury returned to  
3 the courtroom.)

4 THE COURT: Perhaps I did not make clear. There  
5 is no evidence that Mr. Roland ever testified before Mr.  
6 Figueroa, so not only is there no transcript, there is  
7 no evidence that he ever so testified. You may resume  
8 your deliberations.

9 (At 11:37 a.m. the jury resumed their  
10 deliberations.)

11 MR. DAVIS: Thank you, your Honor.

12 (At 1:15 p.m. the jury went out for their  
13 luncheon recess.)

14 (At 2:15 p.m. the jury resumed their  
15 deliberations.)

16 (At 4:00 p.m. a note was received from  
17 the jury.)

18 (Note marked Court Exhibit 2.)  
19 (At 4:10 p.m. the jury returned to the  
courtroom.)

20 THE COURT: I have a note that you are unable  
21 to reach a decision, what shall we do. What you do is  
22 go back and try again. It is only natural sometimes to  
23 resent the opinions of those who disagree with us.  
24 Sometimes after long discussion hostilities spring up  
25 that close our minds to other people's advice. In a

2 large proportion of cases absolute certainty cannot be  
3 expected. That is why we have the jury system. That is  
4 why we put it in the hands of twelve people drawn from  
5 the community, twelve people who don't know anything about  
6 the case who are equally qualified, intelligent , to serve  
7 as jurors. Your verdict, of course, must be the verdict  
8 of each individual juror and not a mere acquiescence in  
9 the conclusion of your fellows. Yet you should examine  
10 the questions submitted to you with candor and with a  
11 proper regard in deference to the opinions of each other.  
12 It is your duty to decide the case if you can do so  
13 conscientiously. You should listen to each other's  
14 arguments with a disposition to be convinced as I told  
15 you in the instructions proper. Talk out your differences.  
16 If much the larger number of you is for conviction, a  
17 dissenting juror should consider whether his doubt is a  
18 reasonable one when it makes no impression upon the mind  
19 of so many others who are equally honest and equally  
20 intelligent. If, on the other hand, the majority is  
21 for acquittal, the minority ought to ask themselves  
22 whether they might not reasonably doubt the correctness  
23 of a judgment which was not concurred in by the majority.

24 What I have just read to you is taken from the  
25 decision of the Supreme Court many, many years ago, when

2           a jury reported an inability to agree as this one has done.

3           I therefore ask you in the light of this  
4           instruction to go back to continue your deliberations  
5           and see whether you can't conscientiously come to a  
6           unanimous verdict.

7           MR. THAU: May we approach the bench before the  
8           jury is discharged or sent back to deliberate?

9           THE COURT: All right, Mr. Thau.

10           (At the side bar)

11           MR. THAU: Your Honor, we except to an Allen  
12           charge some five hours only after deliberations have been  
13           started. In addition, the manner in which the Court  
14           stated its instruction just now suggested that conviction  
15           would be very appropriate in this case because the exact  
16           words were that absolute certainty cannot be expected,  
17           which suggests that the Court is suggesting a conviction  
18           because --

19           THE COURT: You are frivolous. I note your  
20           exception.

21           MR. THAU: May I add one thing, your Honor, the  
22           jury should be instructed that it is entirely proper if  
23           they cannot reach an agreement not to reach one.

24           THE COURT: I won't do that.

25

2 (In open court)

3 THE COURT: Retire for your deliberations.

4 (At 4:15 p.m. the jury resumed their  
5 deliberations.)

6 - - -  
7 (At 5:30 p.m. a note was received from  
8 the jury.)

9 THE COURT: They want the evidence bag with  
10 all contents, both first and second evidence bags with  
11 all contents. They would also like to hear the testimony  
12 of Officer Nieves relating to the exchange of heroin in  
13 both instances.

14 (Testimony of Agent Nieves read.)

15 MR. DAVIS: May I speak briefly, your Honor?

16 THE COURT: No, you may not speak.

17 Retire and continue your deliberations.

18 (At 6:30 p.m. the jury resumed their  
19 deliberations.)

20 (At 7:00 p.m. the jury went out for their  
21 dinner.)

22 (At 8:25 p.m. the jury resumed their  
23 deliberations.)

24 (Note marked Court Exhibit 3.)

25 (At 8:30 a note was received from the jury.)

2 (At 8:45 the jury returned to the  
3 courtroom.)

4 (Jury roll called - all present)

5 THE CLERK: Madam Forelady, have you reached  
6 a verdict?

7 THE FORELADY: Yes, we have.

8 THE CLERK: How do you find the defendant on  
9 Count 1?

10 THE FORELADY: We find the defendant on Count 1  
11 not guilty.

12 THE CLERK: How do you find on Count 2?

13 THE FORELADY: On Count 2, guilty.

14 MR. THAU: Your Honor, I move the jury be  
15 polled on Count 2.

16 THE COURT: Would you poll the jury on Count 2.

17 (Each juror, upon being asked by the Clerk,  
18 "Is that your verdict?" on Count 2, answered in  
19 the affirmative.)

20

21

22

23

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25



Certificate of Service

February 6, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Phyllis Sloan Rosenberg